No. 42

IN THE

Supreme Court of the United States

October Term, 1941

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the FIRST RUSSIAN INSURANCE COMPANY, Established in 1827; VICTOR YERMALOFF, and others

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

BRIEF ON BEHALF OF THE SURVIVING DIRECTORS OF FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827, AS *AMICI CURIAE*

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Counsel for Surviving Directors of First Russian Insurance Company, Established in 1827, Amici Curiae

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Consent of Parties

This brief is respectfully submitted upon the written consent of the parties hereto, filed with the Clerk of this Court.

Interest of Surviving Directors

By decision of the New York Court of Appeals in *Matter of People—Russian Reinsurance Company—First Russian Insurance Company, Established in 1827* (255 N. Y. 415), it was held that:

"3. The surplus remaining after payment of all claims so allowed by the liquidator should be paid to the Russian corporations represented by a quorum of the board of directors, deducting a sum sufficient to cover the expenses of the liquidator as well as intervening liens".

In the companion case of *Matter of People—Northern Insurance Company—Moscow Fire Insurance Company of Moscow, Russia* (255 N. Y. 433), it was further held that:

"1. In determining the disposition of surplus assets of branches in this State of Russian insurance companies, after liquidation by the Superintendent of Insurance, directors, less than a quorum may be treated as conservators of the properties of their companies".

Under the above cited decisions, the surviving directors of the First Russian Insurance Company, Established in 1827, as supported by a large proportion of the shareholders of the Company (255 N. Y. 415, 426), have, as trustees or conservators for creditors and shareholders, a direct interest in the decision of this Court. In the event of an affirmance of the judgment below, the unpaid creditors of the Company whose claims have long since been determined in proceedings by the Superintendent of Insurance as liquidator, will be paid and the liquidation by the Superintendent of Insurance brought to a close. The ownership of any surplus then remaining might still be left for subsequent determination, however, as between the United States and other creditors and the shareholders, since, as shown below, the issue before the Court is limited to the interest of the Superintendent of Insurance as liquidator.

The Limited Issue Before This Court

The present proceedings have nothing whatsoever to do with any foreign claims except those on which attachments were levied prior to August 8, 1925 and those filed with the Superintendent of Insurance prior to June 16, 1931, and there are at present no surplus funds for other creditors or for shareholders (R. 29). Only in the event that there be a surplus after the Superintendent of Insurance has completed his liquidation will there be anything for creditor claims on which attachments were levied or claims otherwise asserted after June 16, 1931, or for shareholders. The present controversy, therefore, between the United States and the Superintendent of Insurance is concerned solely with the question whether the United States is entitled to funds in possession of the Superintendent of Insurance as liquidator as against the adverse creditor claimants whose claims have been finally determined by the courts of the State of New York in the liquidation proceedings conducted by the Superintendent of Insurance. The alleged "residual interest", referred to so frequently in petitioner's brief, is non-existent at the present time and may never exist. Should a residue come into existence at the conclusion of the liquidation by the Superintendent of Insurance, the Superintendent has no present power to dispose of it or to liquidate claims against it, and it will continue intact until the final determination of the disposition thereof either in the pending action instituted by the petitioner or otherwise.

The judgment of the State Supreme Court merely dismissed the complaint in favor of the Superintendent of Insurance (R. 1-2, 4, 7, 9), leaving the action still pending against the other defendants. An affirmance by this Court, therefore, need not determine anything more than that the Superintendent of Insurance may complete his duties as liquidator and pay the specific claims which the

State courts have long since determined to be valid in the liquidation proceedings. An affirmance would seem, therefore, to be clearly required not only by authority of the *Moscow* case (309 U. S. 624) and the *Guaranty Trust Company* case (304 U. S. 126) but even by authority of the *Belmont* case (301 U. S. 324), if deemed applicable, wherein the rights of adverse claimants were recognized and preserved.

Summary of Argument

This case, unlike the case of *United States* v. *Belmont*, relied on by petitioner, does not arise on demurrer but upon a motion for summary judgment, and petitioner, therefore, cannot rely upon assumption of the truth of the allegations of the complaint. The primary question involved on the motion for summary judgment was one of state law and practice under Rule 113 of the New York Rules of Civil Practice. The question was whether the motion papers raised any issue calling for a trial as against the defendant Superintendent of Insurance.

The petitioner, in its affidavit in opposition to the motion for summary judgment (R. 50-51), having raised no issues of fact for trial but having, on the contrary, merely contended that the decision in the *Moscow* case, upon the authority of which the motion was made, had not become final and that the motion was accordingly premature, and having failed to deny the moving allegations to the effect that the instant case involves the same facts and questions presented by the *Moscow* case, petitioner impliedly recognized and agreed that the issues of fact and of law herein are the same as those in the *Moscow* case and that the decision herein should be governed by the final decision of this Court in the *Moscow* case.

This Court having thereafter affirmed the judgment in the *Moscow* case dismissing the similar claim of the pe-

titioner therein (although by an equally divided court), and having thereafter denied a rehearing in such *Moscow* case, it is not now open to petitioner to change its position herein and to seek a trial of the same issues of fact involved and decided in the *Moscow* case.

The instant appeal is in effect merely an attempt to obtain indirectly a reargument of the issues in the *Moscow* case which this Court has already denied.

In any event, the decision by this Court in the *Moscow* case was correct and should not be overruled.

The majority opinion in the *Belmont* case has no application here not only because that case was merely a decision on the pleadings, but also because the subsequent *Guaranty Trust Company* decision (304 U. S. 126) plainly shows that the minority opinion in the *Belmont* case now represents the view of this Court. Furthermore, both under the majority and the minority opinions in the *Belmont* case, the adverse creditor claims finally determined in the liquidation proceedings conducted by the Superintendent of Insurance as liquidator of the First Russian Insurance Company must be paid before there can be any residual interest of the First Russian Company or of its alleged statutory successor, or the assignee thereof. As conclusively held in the *Guaranty Trust Company* case, the acceptance of the Litvinoff assignment by the Executive did not imply any federal policy compelling the extraterritorial enforcement of Soviet decrees as against property in the custody of a State court or of State officials; and in the silence of the Federal Government, State laws and State policies have not been abrogated.

The United States branch of the First Russian Insurance Company was, under New York law, an organization separate and distinct from the home office of the Company, and its local capital was always subject to the laws of the State of New York. When the Superintendent of Insurance took over such branch for liquidation, he did so under New York law in the interests of the creditors and

policyholders and shareholders of the First Russian Company wherever located; and, prior to recognition of the Soviet Government by the United States, the state courts in the exercise of an undoubted jurisdiction determined, in the absence of a liquidation for the benefit of creditors and shareholders at the domicile, that foreign creditors having valid attachment liens which accrued prior to beginning of the local liquidation in 1925 or claims filed in the liquidation proceedings were entitled to have their claims determined in the local liquidation in accordance with the established law, including the law with particular reference to the First Russian liquidation as settled by the decision of this Court in *United States* v. *Bank of N. Y. & Tr. Co.*, 296 U. S. 463, 476.

The petitioner falls into error in contending that the facts as found in the *Moscow* case were not made a part of the instant record on the motion for summary judgment.

Even without the aid of the decision in the *Moscow* case, and even without the findings of fact made in that case, the judgment below should be affirmed because it goes no further than to permit the Superintendent of Insurance to conclude his liquidation by payment of the claims finally determined in the liquidation proceeding, leaving open and undetermined any question of the right of petitioner to assert or to maintain a claim to any residual interest which may be disclosed after the conclusion of the local liquidation.

This case does not involve any question of the construction or validity of the Litvinoff assignment but involves only the question of the title of the Soviet government under Soviet confiscation decrees to assets located and trusteed in the State of New York. Such question does not arise under the Constitution or laws of the United States but under the laws of the Soviet Union or of the State of New York.

FIRST POINT

The motion for summary judgment did not admit the allegations of the complaint and consequently the case of *United States* v. *Belmont*, relied on by petitioner, has no application.

The procedure and principles relative to a motion for summary judgment as distinguished from a motion to dismiss for insufficiency are well established. They were introduced into the practice of New York in 1921. They have now also been adopted in Rule 56 of the Federal Rules of Civil Procedure.

The petitioner, in relying on the cases of *United States* v. *Belmont*, 301 U. S. 324, and *United States* v. *Manhattan Company*, 276 N. Y. 396, erroneously appears to view the motion herein made by the Superintendent of Insurance which resulted in the dismissal of the complaint herein in his favor, as merely a motion to dismiss for insufficiency. On the contrary, such motion was a motion for summary judgment under Rule 113 of the New York Rules of Civil Practice and Section 476 of the New York Civil Practice Act. The decision on the motion was a dismissal of the complaint on the merits in favor of the Superintendent of Insurance.

The motion was made on an affidavit showing that the instant claim of petitioner is in all respects identical with the claim of petitioner as dismissed in the *Moscow* case (280 N. Y. 286; 309 U. S. 624; 309 U. S. 697). The opposing affidavit on behalf of petitioner did not deny a single allegation of the moving affidavit but relied entirely on the argument that the motion was premature in view of the then proposed application to this Court in the *Moscow* case for a writ of certiorari.

The moving affidavit on behalf of the Superintendent of Insurance having alleged that the facts in the instant case,

including those relating to the Soviet law, are parallel with those which had been established in the *Moscow* case (R. 15), it was incumbent upon petitioner if it desired to claim that there were other facts and issues in the instant case which required a trial, to set forth such facts and issues in its opposing affidavit in order that the Court might determine whether there was an issue of substance to be tried. (Rule 113; *Richard* v. *Credit Suisse*, 242 N. Y. 346, 349; *Curry* v. *Mackenzie*, 239 N. Y. 267, 270; *General Investment Co.* v. *Interborough R. T. Co.*, 235 N. Y. 133, 142-143; *Dwan* v. *Massarene*, 199 App. Div. 872).

In opposing the motion of the Superintendent of Insurance, the petitioner was not entitled to rely upon an assumption of the truth of the allegations of the complaint but was required to set forth specifically by affidavit any facts upon which it relied to show issues requiring a trial (*Gnozzo* v. *Marine Trust Co. of Buffalo*, 258 App. Div. 298, 299; aff'd 284 N. Y. 617; *Lederer* v. *Wise Shoe Co.*, 276 N. Y. 459, 462-463; *O'Meara* v. *National Park Bank*, 239 N. Y. 386, 395; *White* v. *Merchants Despatch Transportation Co.*, 256 App. Div. 1044).

The petitioner, in its opposing affidavit, having denied none of the allegations of the moving affidavit, and having alleged no facts except that it intended to apply for certiorari in the *Moscow* case, the Court correctly assumed that the allegations of the moving affidavit were true and that there were no issues to be tried (*Lederer* v. *Wise Shoe Co.*, *supra*, at p. 464; *General Investment Co.* v. *Interborough R. T. Co.*, *supra*, at p. 143; *Title Guarantee & Trust Co.* v. *Smith*, 215 App. Div. 448, 453; *Lee* v. *Graubard*, 205 App. Div. 344; *Pross* v. *Foundation Properties, Inc.*, 158 Misc. 304, 308; *Gerace* v. *Fabbozi*, 161 Misc. 450; *Mosca* v. *Parker-Aeolus Inc.*, 130 Misc. 186, 187; *Maltz* v. *Daly*, 120 Misc. 466, 467).

The fifth paragraph of Rule 113, applicable to a defendant, provides that:

"Where an answer is served in any action setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established *prima facie* by documentary evidence or official record, the complaint may be dismissed on motion unless the plaintiff by affidavit, or other proof, shall show such facts as may be deemed by the judge hearing the motion, sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record."

Under the provisions of the above quoted fifth paragraph of Rule 113, the defendant Superintendent of Insurance was entitled to move for summary judgment on the documentary evidence or official record in the *Moscow* case irrespective of the question whether the instant case is one of those enumerated in the eight numbered sections of the first paragraph of Rule 113 (*Lederer* v. *Wise Shoe Co.*, 276 N. Y. 459; *White* v. *Merchants Despatch Transportation Co.*, 256 App. Div. 1044; *Levine* v. *Behn*, 257 App. Div. 156, reversed on other grounds, 282 N. Y. 120; *Pross* v. *Foundation Properties, Inc.*, 158 Misc. 304).

That the official record in the *Moscow* case, referred to in the moving affidavit, was not physically attached to the moving affidavit is immaterial. The record in that case, together with the remittitur from the Court of Appeals, was on file in the office of the Clerk of the Supreme Court and both the Court and the parties were familiar with it. The Court took judicial notice of it (*Matter of Clarke*, 145 Misc. 660, 665; *Matter of Greenberg*, 158 Misc. 446, 448; *Matter of Ordway*, 196 N. Y. 95, 97). "There is nothing in Rule 113 which specifies or limits the form or character of the documentary evidence or official record upon which the motion for summary judgment by a defendant is to be based" (SHIENTAG, *J.*, in *Levine* v. *Behn*, 169 Misc. 601, 605). "All that is required is that the defendant, where his defense is founded upon documentary or official record, shall show facts establishing a defense *prima facie*. If he

submits merely part of the record, it is within the province of the plaintiff to submit the remainder, if in his judgment he can thereby show facts sufficient to raise an issue as to the official record" (*Per Curiam* in *Wels* v. *Rubin*, 254 App. Div. 484, 485).

If plaintiff had desired that the *Moscow* record be physically attached to the moving papers, he should have raised the question at the time of the submission of the motion (*White* v. *Merchants Despatch Transportation Co.*, 256 App. Div. 1044).

Moreover, the profert of the *Moscow* record in the moving affidavit made such record a part of the moving affidavit, and the Court and the several parties were bound to consider it. As said in *Straus* v. *American Publishers Assn.*, 201 Fed. Rep. 306, 309 (appeal dismissed 235 U. S. 716), in deciding a motion for judgment on the pleadings:

> "The first contention of the plaintiffs in error is that the record of the cause in the state court should not have been inspected by the Circuit Judge, because it was not annexed as an exhibit to the answer. This is a very technical objection, especially in view of the fact that the action was referred to by the plaintiffs themselves in their complaint. It would prove a cumbersome practice to load such records upon pleadings. By the profert the record became a part of the pleading and the court was bound to inspect it as such. That is the practice in this circuit (*Bogart* v. *Hinds* (C. C.) 25 Fed. 484); and there is abundant authority elsewhere (*American Bell Tel. Co.* v. *Southern Tel. Co.* (C. C.) 34 Fed. 803; *Dickerson* v. *Greene* (C. C.) 53 Fed. 247; *Germain* v. *Wilgus*, 67 Fed. 597, 14 C. C. A. 561; *Heaton* v. *Schlochtmeyer* (C. C.) 69 Fed. 592)".

The final judgment of the State Court in the instant case must, of course, be taken as determining that the procedure actually adopted satisfied all state requirements (*United Gas Co.* v. *Texas*, 303 U. S. 123, 139). This Court has no revisory power over state practice except where

such practice is used to evade constitutional guarantees (*Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287, 296).

The primary question here is merely one of state practice—that is to say, whether the petitioner in its opposing affidavit on the motion for summary judgment set forth any or sufficient facts to indicate that there was any issue requiring a trial of the petitioner's claim as against the Superintendent of Insurance. Obviously, no such facts were set forth and the Court was therefore bound under settled New York law to grant the motion for summary judgment.

SECOND POINT

The instant case should be now finally determined by this Court without remand for trial.

The petitioner's sole ground of opposition to the motion for summary judgment was that this Court had not then rendered its decision in the *Moscow* case. There was not then, nor is there now, any claim by petitioner that the facts and the questions in the instant case are any different from those in the *Moscow* case, or that the evidence on any trial in the instant case would be any different from that in the *Moscow* case. As shown by the decisions cited under the First Point hereof, the petitioner's failure to deny the moving allegations to the effect that the facts in the *Moscow* case and the instant case are parallel and that the Soviet decrees involved are also the same constituted admissions by the petitioner of the truth of such allegations. Thus, the assumptions of fact and the theories of law upon which the motion for summary judgment was submitted by both parties and entertained by the court were that the instant case involved precisely the same facts and questions as were involved in the *Moscow* case, and that the final decision in the *Moscow*

case would govern the decision in the instant case. The petitioner may not, even if it desired to do so, take an inconsistent position in this Court. (*Brown* v. *Gurney*, 201 U. S. 184, 190; *United States Shipping Board Emergency Fleet Corporation* v. *South Atlantic Dry Dock Co.*, 19 Fed. (2nd) 486, 489; *Southern Cotton Oil Co.* v. *Shelton*, 220 Fed. Rep. 247, 256).

This Court should now, therefore, decide the instant case either as a case involving in all material respects the same facts and the same questions presented by the *Moscow* case (*Stone* v. *Farmers Bank of Kentucky*, 174 U. S. 409, 412) or as a case involving only the adjudged creditor claims determined in the liquidation proceedings and protected even by the decision in the *Belmont* case. To any extent deemed necessary, this Court may take notice of its records in the *Moscow* case as heretofore heard and determined by this Court (*Freshman* v. *Atkins*, 269 U. S. 121, 124; *Dimmick* v. *Tompkins*, 194 U. S. 540, 548; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217).

"One trial of an issue is enough" (*Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 78; *Baldwin* v. *Traveling Men's Association*, 283 U. S. 522, 525).

THIRD POINT

The decision in the *Moscow* case was correct, and the judgment in the instant case should be affirmed on reason and on the authority of the prior *Moscow* decision.

In the *Moscow* case, the undersigned, as counsel for Paul Lucke, sole surviving director of the Moscow Company and conservator of its property, and as such a party in the cause, submitted to this Court a brief which argued at some length the questions involved in that case. As,

from the viewpoint most favorable to petitioner, precisely the same questions are involved in the instant case, the Court is respectfully referred to that brief as containing the reasons and authorities upon which the undersigned rely in respectfully urging that the judgment in the instant case should be affirmed. Without repeating here the arguments advanced by the undersigned in the *Moscow* case, it may not be out of place to note briefly hereunder the answers to some of petitioner's arguments in its brief in this case.

Answering Petitioner's Point I

In particular, the argument of the petitioner herein upon the *Belmont* case is fallacious. The petitioner contends that the *Belmont* case is conclusive. This Court did not think so in the *Moscow* case. Moreover, even the *Belmont* case indicated that adverse creditor claims, such as those involved here, would be entitled to protection. The petitioner further contends that the *Guaranty Trust Company* case (304 U. S. 126) has no application here. In that case, the petitioner here, contrary to its assertions on page 34 of its brief, argued broadly that the United States as assignee of the Soviet Government was not bound by the New York Statute of Limitations since such statute "conflicts with and impedes the execution of the Executive Agreement between the Soviet Government and the United States by which the assignment was effected" (304 U. S., at p. 131). This Court held that, assuming that the respective rights of the United States and the Soviet Government could have been altered by force of an executive agreement, there is nothing in the agreement and assignment of November 16, 1933, which purports to enlarge the assigned rights in the hands of the United States (304 U. S., at p. 142). Continuing, this Court, at page 143 in the *Guaranty Trust Company* case, held further as follows:

> "There is nothing in either document to suggest that the United States was to acquire or exert any greater rights than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims, or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity to local law. Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them."

It is significant to note that the above quotation is in almost the exact words of the concurring opinion in the *Belmont* case.

Under the clear language of the opinion in the *Guaranty Trust Company* case and the concurring opinion in the *Belmont* case, there is no support whatsoever for petitioner's argument on page 26 and the following pages of its brief, to the effect that the Executive Agreement of November 16, 1933, established a national policy prohibiting any court from denying extra-territorial effect to the Soviet decrees of confiscation. The question of extra-territorial effect of the Soviet decrees upon property in this country thus remained a judicial question unaffected by the Executive Agreement (*U. S.* v. *Bank of New York & Trust Co.*, 10 Fed. Supp. 269, 272). As said in *Banco De Espana* v. *Federal Reserve Bank*, 114 Fed. 2nd 438, 442:

> "The Courts will leave for the Executive the determination of all 'political' issues; in the international field this means such matters as the recognition of new governments or the making of treaties, *not the direct determination of questions of property.*" (Italics supplied.)

Aside from the conclusive effect of the decision of this Court in the *Guaranty Trust Company* case on this point, it should be noted that, in the interchange of letters by the

President of the United States and Commissar Litvinoff of the Soviet Government, mention was made not only of claims and counterclaims of the two governments involved, but also of the nationals of each country. There could not have been, therefore, an intention in the correspondence to eliminate at the outset all possible claims of Russian nationals under the agreement and assignment.

Even without the support of an alleged but non-existent national policy, operating to compel the enforcement of the Soviet decrees of confiscation as against property which has always been located in this country, petitioner contends that even in the silence of the Federal Government the States have no power to deny effect extra-territorially to the Soviet decrees, because, as alleged, a denial of such effect would be a hostile act. It has never before been held or suggested that in the absence of an applicable federal constitutional, statutory or treaty provision the decision of a State court rendered according to its own law upon questions of title to real or personal property within its custody or control constitutes a hostile act against anyone. Nor has it ever before been held or suggested that a decree of a foreign government has any extra-territorial force as a matter of right. It would seem too clear for argument that without the aid of some established federal law or policy state laws and rights arising under them are not to be overridden, and such was the holding in the *Guaranty Trust Company* case and in the concurring opinion in the *Belmont* case, *supra*. The case of *Hines v. Davidowitz*, 312 U. S. 52, so much relied upon by petitioner, was not a case of silence of the Federal Government, but one where there were both a state and a federal statute covering the same subject-matter which were held to be in conflict. The only contention in such case which was passed upon by this Court was the final contention of appellees that the federal statute involved precluded state action (312 U. S., at pp. 61-62). In fact, it was not denied that the state statute was valid until the enactment of the federal law (312 U. S., at p. 75).

Since, as held in the *Guaranty Trust Company* case, the United States has no greater rights here than the Soviet Government would have had in the absence of the assignment by it to the United States, the silence of the Federal Government as to any declared policy with respect to extra-territorial force of the Soviet decrees can have only the result that the state law and policy remained just as effective as opposed to the claims of the assignee petitioner as they would have been as opposed to the unassigned claims of the Soviet Government itself.

The situation here is not at all like the situation arising from the decrees of the governments in exile of the countries of Europe occupied by Germany, referred to in petitioner's brief. The decrees of the governments in exile are not confiscation decrees. They are conservation and protection decrees, designed to safeguard and not to destroy the rights of the owners, and to prevent any property involved from falling into the hands of the Germans.

Answering Petitioner's Point II

In spite of petitioner's argument to the contrary, it has always been the law of the State of New York that a domestic branch established under New York law of an alien insurance company is a complete organization, separate from its home office, having its own capital and a legal domicile within the State of New York (*Moscow* case, 280 N. Y. 286, 309; *James & Co.* v. *Rossia Ins. Co.*, 247 N. Y. 262, 265; *Matter of People—Norske Lloyd Ins. Co.*, 242 N. Y. 148, 159-161; *James & Co.* v. *Second Russian Ins. Co.*, 239 N. Y. 248, 255; *Comey* v. *United Surety Co.*, 217 N. Y. 268, 274; *Morgan* v. *Mutual Benefit Life Ins. Co.*, 189 N. Y. 447, 453-454; *Martine* v. *International Life Ins. Society*, 53 N. Y. 339, 346-348; *Standard Marine Ins. Co.* v. *Alex Verity*, 243 App. Div. 639, 640). As said by the Superintendent of Insurance in his annual report to the Legislature for the year 1915: "Under our statutes,

therefore, the United States Branches transact business as *quasi* entities rather than as members of their parent corporations" (*N. Y. Ins. Report*, Part I, Fire and Marine, 1915, p. 10). It was because of this situation that the United States branch of the First Russian Company was able to transact business and was permitted by the Superintendent of Insurance to do so long after the home office in Petrograd had been terminated and liquidated and its Russian assets confiscated.

As required by the New York Insurance laws, the capital of the United States branch of the First Russian Company was segregated from the capital of the home office of the Company and invested in securities specified by the New York Insurance Law, legal title to which was vested in local insurance officials and in local trustees under written indentures of trust. Such local capital came under the protection of and was subject to the laws of the State of New York, and the courts of that jurisdiction had the right to determine the question of conflicting rights in and to such local capital (*Hutchison* v. *Ross*, 262 N. Y. 381, 388-389).

When the Superintendent of Insurance in 1925, long prior to recognition of the Soviet Government by the United States, by order of the State Supreme Court took over the United States branch of the First Russian Company for liquidation, the Superintendent took possession of the assets not merely for the benefit of creditors in New York but for the benefit of all the creditors and policyholders and shareholders of the Company wherever located. As said by the New York Court of Appeals in *Matter of People, City Equitable Fire Insurance Co.*, 238 N. Y. 147, 156:

> "The Superintendent is not, therefore, to take possession of the property solely for the benefit of creditors or policyholders in this state or in the United States but for the interest of all its policyholders, creditors and stockholders wherever they may be. He is to liquidate the business here for that purpose".

In 1931, still prior to recognition, the New York Court of Appeals held that the surplus assets of the First Russian Company must be made available for payment of creditors and policyholders with claims founded upon foreign business (*Matter of People—Russian Reinsurance Company* and *First Russian Insurance Company*, 255 N. Y. 415, 422), and that any surplus remaining after payment of all valid claims filed with the Superintendent of Insurance or founded upon attachments must be paid to a quorum of the directors of the Company (p. 424). Such decision was a judgment of legal finality and was so intended to be. All that was left was the administrative detail. Recognition of the Soviet Government came thereafter and was not retroactive in effect as to acts sought to be given effect extra-territorially (*Guaranty Trust Co. v. United States*, 304 U. S. 126, 140; *Lehigh Valley R. Co. v. State of Russia*, 21 Fed. 2nd 396, 401; certiorari denied, 275 U. S. 571; *Vladikavkazsky Ry. Co. v. New York Trust Co.*, 263 N. Y. 369, 379). Recognition and the assignment executed at the time thereof had no effect as law in this country except as from November 16, 1933; and rights to property having a situs in this country which had accrued prior to such date were not invalidated by recognition and the assignment made at the time thereof (*United States v. Arredondo*, 6 Pet. 691, 748; *Haver v. Yaker*, 9 Wall. 32, 34; *Dooley v. United States*, 182 U. S. 222, 239; *Neilsen v. Johnson*, 279 U. S. 47, 52; *Todok v. Union State Bank*, 281 U. S. 449, 454). Whatever the effect of recognition and whatever the meaning of the assignment, decisions of our courts rendered with legal finality prior to recognition and the assignment are *res judicata* and valid against the world (*Guaranty Trust Company v. United States*, 304 U. S. 126, 141; dissenting opinion in *U. S. v. Bank of New York and Tr. Co.*, 77 Fed. 2nd 866, 877-878, the dissenting opinion being on other grounds).

While it is true that the courts of New York have always remitted surplus assets of an alien insurance company to a domiciliary liquidator where one existed for the benefit of creditors and shareholders, it is clear that the liquidation of a corporation implies winding up and distribution of the assets among the creditors and stockholders (*United States* v. *Bank of New York and Trust Co.*, 10 Fed. Supp. 269, 271; *Lafayette Trust Co.* v. *Beggs*, 213 N. Y. 280, 283-284; *Matter of Silkman*, 121 App. Div. 202). No case is cited and none exists holding that local assets must be remitted to a foreign jurisdiction to permit the foreign sovereign to confiscate them.

A confiscating foreign government is not a liquidator within the meaning of the term under the conflicts of law rule, and its decrees of confiscation are not effective as such in other jurisdictions (*Huntington* v. *Attrill*, 146 U. S. 657, 669; *Hilton* v. *Guyot*, 159 U. S. 113, 163; *Second Russian Ins. Co.* v. *Miller*, 268 U. S. 552, 560; *James & Co.* v. *Second Russian Ins. Co.*, 239 N. Y. 248, 257; *Frenkel & Co.* v. *L'Urbaine Fire Ins. Co.*, 251 N. Y. 243, 249).

Since there was no basis for the application of the ordinary rule of conflicts of law, the state courts undertook themselves to make distribution of the surplus assets in satisfaction of the claims of foreign creditors proceeding locally in the New York courts. This was in accordance with accepted law and practice.

As said in *Sands* v. *E. S. Greeley & Co.*, 88 Fed. 130, 133 (WALLACE, J.):

> "It rests in the discretion of the court appointing the receiver whether the assets within its jurisdiction shall be distributed under its own direction or shall be transmitted to the primary receiver."

As said by this Court in *Clark* v. *Williard*, 294 U. S. 211, 214:

> "The principle of these decisions applies with undiminished force to a statutory successor. In respect of his subjection to the power of the local law, his position is no better than that of the dissolved corporation to whose title he has succeeded or of its voluntary assignee upon a trust for all the creditors. He must submit, as must they, to the mandate of the sovereignty that has the physical control of what he would reduce to his possession."

Finally, in the very matter of the First Russian Insurance Company, this Court in *United States* v. *Bank of New York and Trust Co.*, 296 U. S. 463, 476, speaking of the *in rem* liquidation proceedings, held that:

> "When the statutory trust was satisfied by the payment of domestic creditors and policyholders, it did not follow that the remaining assets were automatically released and the state court was *ipso facto* shorn of its jurisdiction. The court still had control of the property and necessarily had the pertinent equitable jurisdiction to decide what should be done with it. In such a case, the court might direct that the surplus assets should be remitted to a domiciliary receiver—if there were one—on appropriate conditions. *Matter of People* (*Norske Lloyd Insurance Co.*), 242 N. Y. 148; 151 N. E. 159. Or the court might direct further liquidation, in order to provide for the payment of other claims, if that course appealed to the sense of equity in the particular circumstances. *Matter of People* (*Russian Reinsurance Co.*), *supra*, p. 423. The latter action was taken and the Superintendent of Insurance was continued in possession of the assets subject to the control of the court. He was virtually its receiver for the purposes specified."

Answering Petitioner's Point III

Under its Point III, petitioner again argues that the allegations of its complaint must be accepted as true. Under the first point of this brief of the undersigned, it is shown that this argument is fallacious under the state law relating to summary judgment.

Petitioner contends that the motion papers of the Superintendent of Insurance did not raise any issue of fact. This contention is erroneous. The moving affidavit specifically alleged:

> "Ths plaintiff claims ownership of the funds by virtue of several decrees of the Russian Government which, it is claimed, dissolved, terminated and nationalized all Russian insurance companies and organizations. It is further alleged that these decrees transferred title to the assets of the United States Branch of the First Russian Insurance Company, Established in 1827, to the Russian State which in turn assigned the property to the United States of America on November 16, 1933 (Complaint, pp. 8-9).
>
> "The bases, therefore, of the claim of the plaintiff are the Soviet decrees, which, it is asserted, have extra-territorial effect and had force to transfer title to property always in the State of New York to the Soviet Government (R. 13-14).
>
> • • • • •
>
> "So far as it is material here, therefore, the facts in the Moscow and the instant cases are parallel. The facts could not be different because both companies had to comply with the provisions of Section 27 of the Insurance Law, (*Cons. Laws*, ch. 78) as a condition precedent to doing business here.
>
> "The Soviet decrees involved are also the same. In the Moscow case the United States relied on the decree of November 18, 1919 annulling all life insurance contracts, a decree dated March 4, 1919 on the liquidation of obligations of State enterprises, and a decree dated June 28, 1918 that certain enterprises located within the Soviet Union are the property of the Republic. In the instant case, the same decrees are relied upon (Complaint, par. 8)" (R. 15-16).

The prior allegation in the moving affidavit that "There is no dispute as to the facts" (R. 13) was directed to the facts as settled in the *Moscow* case, and to the facts concerning the history of the organization of the United States

branch of the First Russian Insurance Company and those concerning the proceedings and litigations involving the said Company since its admission to do business in the State of New York.

The petitioner asserts that the only questions considered by the New York Court of Appeals in this case were the questions of law deciding in the *Moscow* case. It is, of course, true that the Court of Appeals is limited to consideration of questions of law, but the issue whether a finding of fact is supported by evidence is a question of law. Moreover, the court of first instance and the Appellate Division were obliged to consider and decide the questions of fact involved.

It is respectfully submitted, as contended in the first point of this brief, that the record in the *Moscow* case was before the state courts throughout in the instant case, and that it is before this Court to the same extent as it was in the *Moscow* case.

FOURTH POINT

Even without the support of the *Moscow* case or the findings of fact made therein, the judgment below should be affirmed.

As hereinbefore shown, the motion for summary judgment was made only on behalf of the Superintendent of Insurance and the petitioner's complaint was dismissed only in favor of the Superintendent of Insurance. The issue on the instant record is, therefore, much narrower than in the *Moscow* case. Here, the Superintendent of Insurance is still conducting the *in rem* liquidation begun more than eight years prior to recognition of the Soviet Government by the United States. In the liquidation conducted by him pursuant to New York Law, the state courts have finally determined certain creditor claims,

which have not been paid solely by reason of stays procured by petitioner. These claims are *res judicata* which would be binding on the First Russian Company if it were still in existence and are binding on any liquidator or statutory successor thereof. There can be no "residual interest" for anybody, not even the petitioner, until the payment of these adjudicated claims and the interest and expenses—constantly increasing—caused by the litigation of the petitioner. It is respectfully submitted that the petitioner has no just claim to any part of the First Russian assets; but assuming that it has a just claim to the "residual interest" referred to in petitioner's brief, the judgment below should be promptly affirmed in petitioner's own interest to the end that further interest and expenses may be terminated and the possibility of an ultimate residue not entirely eliminated.

FIFTH POINT

The question of the alleged title of the Soviet Government to the property in the custody of the Superinendent of Insurance as liquidator of the domesticated United States branch of the First Russian Insurance Company is not one arising under the Constitution or laws of the United States.

The claim asserted herein by the petitioner is asserted solely as assignee of the Soviet Government. The transfer of such claim to the United States did not give it any greater validity than it possessed in the hands of the assignor (*United States* v. *Buford*, 3 Pet. 12, 30). The Litvinoff assignment, as held by this Court, without dissent in *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 143, did not purport to confer upon the United States any rights other than those which the Soviet Government

could have itself exercised after diplomatic recognition—that is, to collect the claims in conformity to local law—and did not purport to override state laws or to impair rights arising under them.

There is here no dispute as to the validity of the acceptance of the assignment, nor is there any dispute over the fact that the petitioner obtained by the assignment any rights which the Soviet Government had prior thereto in and to the funds in the custody of the Superintendent of Insurance. The ultimate question here is only whether the Soviet Government had any rights to convey, as against the particular funds here involved, to the prejudice of creditor claimants to the funds whose claims have been finally determined. If it had any such rights, they did not arise under the Constitution or laws of the United States, but had their genesis either in Soviet law or in the laws of the State of New York.

The only federal question lurking in the background of this case is to be found in the fact that the President of the United States, on its behalf, accepted the Litvinoff assignment under authority conferred upon him by the Constitution of the United States. What, if anything, the United States got by the assignment, however, so far as these funds are concerned, depends entirely upon the law either of the Soviet Government or the law of the State of New York which, in the person of its Superintendent of Insurance, holds the funds (*Gully* v. *First National Bank*, 299 U. S. 109).

As said by Mr. Justice CARDOZO in the above cited *Gully* case, at page 112:

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. *Starin* v.

New York, 115 U. S. 248, 257; *First National Bank v. Williams*, 252 U. S. 504, 512. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another".

It is further said by Mr. Justice CARDOZO in the *Gully* case at page 116:

> "By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. *Louisville & Nashville R. Co. v. Mottley, supra.* With no greater reason can it be said to arise thereunder because permitted thereby".

If a suit upon a state statute does not arise under federal law, certainly a suit upon Soviet confiscation decrees does not so arise.

By its decisions in the *Moscow* case, and in the instant case, the New York Court of Appeals decided only two primary questions:

> 1st—Whether the Russian nationalization decrees were intended to have an extraterritorial effect to cover funds of a U. S. branch of a Russian insurance company deposited under the laws of the State of New York; and
>
> 2nd—Whether, even if so intended, the courts of New York will give them their intended effect (*Moscow* case, 280 N. Y. 286, 302).

Neither of these questions arose under federal law or required any reference to federal law. The negative answer to the first of such questions involved merely a review of the evidence to ascertain whether it supported the findings. A state court construction of a law of another jurisdiction to the effect that it was not intended to have

extraterritorial effect does not raise a federal question (*Western Life Indemnity Co.* v. *Rupp*, 235 U. S. 261, 274-275). The negative answer to the second of such questions involved the construction of the laws of the State of New York which likewise raised no federal question (*Pacific Ins. Co.* v. *Commission*, 306 U. S. 493, 500; *Milwaukee County* v. *White Co.*, 296 U. S. 268, 272). In particular, the courts of the State of New York were competent to decide all questions not expressly excluded by federal law relating to the business and property of a domesticated U. S. branch of a Russian company established under the laws of the State of New York. As said by this Court in *Graham* v. *Boston, Etc. R. R. Co.*, 118 U. S. 161, 168: "* * * one State may make a corporation of another State, as there organized and conducted, a corporation of its own, *quoad* any property within its territorial jurisdiction."

Conclusion

The property here involved was deposited and trusteed in the State of New York subject to the protection as well as the liability of New York law (*Hutchison* v. *Ross*, 262 N. Y. 381, 388-391; *Weissman* v. *Banque de Bruxelles*, 254 N. Y. 488, 492-494; *U. S.* v. *Guaranty Trust Co.*, 293 U. S. 340, 345-346; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664, 671.)

Under constitutional guaranties, neither the Federal Government nor the State Government could confiscate it (*Russian Fleet* v. *United States*, 282 U. S. 481), or, it is submitted, agree to be the beneficiary of foreign confiscation decrees. Nor, under the Federal Constitution, could the State of New York either pass or enforce any law impairing the implied contract between the state and the owners of the property implicit in the deposit of the funds with the statutory trustees. As said by this Court in *Williams* v. *Bruffy*, 96 U. S. 176, 184:

> "The Constitutional provision prohibiting a State from passing a law impairing the obligation of contracts, equally prohibits a State from *enforcing* as a law an enactment of that character, from whatever source originating." (Italics by the Court.)

The funds, while deposited and trusteed primarily for the benefit of U. S. creditors and policyholders of the Company, were secondarily received for the benefit of "all its policyholders, creditors and stockholders wherever they may be" (*Matter of People (City Equitable Fire Ins. Co.)*, 238 N. Y. 147, 156; *Matter of People (Norske Lloyd Ins. Co.)*, 242 N. Y. 148, 165). In protecting creditors and shareholders, the New York courts were therefore merely carrying out the purposes of the statutory trusts created under New York law. That in protecting the claims of creditors and shareholders in preference to the claims of a confiscating foreign government never having custody or control of the funds, the courts of New York were acting in accordance with just and equitable principles, no one can dispute.

The petitioner has no just claim to any of the funds in question because the Soviet Government has none. If it has any arguable claim at all such claim is limited to what may remain after completion of the pending liquidation by the Superintendent of Insurance.

The judgment below should be affirmed.

Respectfully submitted,

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November, 1941.